To be Argued by:
W. BRADLEY HUNT
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

DAVID KATLESKI,

Plaintiff-Respondent,

– against –

CAZENOVIA GOLF CLUB, INC.,

Defendant-Appellant,

– and –

JUSTIN HUBBARD and RICHARD HUBBARD,

Defendants.

Case No.: CV-23-0642

REPLY BRIEF FOR DEFENDANT-APPELLANT

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Introduction

Plaintiff-Respondent David Katleski argues in his brief (at 1) that, because there are "conflicting expert submissions," there must be a triable issue of fact as to whether Defendant-Respondent Cazenovia Golf Club, Inc. ("CGC") unreasonably enhanced the risk of a golfer being struck by an errant shot from an adjoining hole. This is simply wrong.

Tellingly, the New York Court of Appeals recently affirmed the decision of this Court in *Secky v. New Paltz Central School Dist.,* 195 A.D.3d 1347 (3rd Dept. 2021), which is discussed in CGC's initial brief at 17. *See Grady v. Chenango Valley Central School Dist.,* 40 N.Y.3d 89 (2023) (affirming Secky). In *Secky,* this Court correctly applied the assumption of risk doctrine and dismissed the complaint of a plaintiff who had been injured in a school basketball practice – although the plaintiff had submitted an expert affidavit criticizing the safety of the practice. *See Secky,* 195 A.D.3d at 1348 ("The *opinion of plaintiff's expert* that the drill could have been safer … was *insufficient to raise an issue of fact* given that the failure to do so did not unreasonably increase the inherent risks of the drill or playing basketball") (emphasis added).

In *Grady,* the Court of Appeals affirmed this Court's decision in *Secky,* because the plaintiff's injury – like Katleski's here – "is one inherent in the sport

… and so he assumed the risk of the injury he sustained." 40 N.Y.3d at 97. In addition, the Court of Appeals confirmed the settled principle that, in an assumption of risk case, a defendant can be liable for unreasonably enhancing a risk only if the danger is "*unique* and created a dangerous condition *over and above the usual dangers that are inherent*" in the sport. 40 N.Y.3d at 99 (emphasis added; quotation marks omitted).

In this case, there is simply no basis in the record for a finding that CGC created a risk that was "unique" or "over and above the usual dangers that are inherent" in golf. Katleski does not really argue otherwise. Indeed, this case falls squarely within the scope of the assumption of risk doctrine, and the complaint should be dismissed.

POINT I

UNDER SETTLED NEW YORK LAW, GOLFERS LIKE KATLESKI ASSUME THE RISK OF BEING STRUCK BY AN ERRANT SHOT.

A. The risk of being struck by an errant shot is inherent in the game of golf.

CGC's initial brief established that, under settled New York law, the possibility of being struck by an errant golf shot is a danger "inherent in golf" – such that any golfer is deemed to have assumed that risk. *Anand v. Kapoor,* 15 N.Y.3d 946, 948 (2010). Katleski does not argue to the contrary. Instead, as

discussed in point II below, he incorrectly argues that CGC somehow unreasonably enhanced this well known risk.

Indeed, the caselaw leaves no doubt whatsoever that golfers like Katleski assume the risk of being struck by mis-hit balls. *See Anand,* 15 N.Y.3d at 948 ("being hit without warning by a 'shanked' shot while one searches for one's own ball" is "a commonly appreciated risk of golf"); *Rinaldo v. McGovern,* 78 N.Y.2d 729, 733 (1991) ("the possibility that the [golf] ball will fly off in another direction is a risk inherent in the game"); *Delaney v. MGI Land Dev.,* 72 A.D.3d 1254, 1254 (3rd Dept. 2010) ("Supreme Court correctly granted defendants' motions for summary judgment because plaintiff assumed the risk of being struck by a golf ball"); *Lundin v. Town of Islip,* 207 A.D.2d 778, 779 (2nd Dept. 1994) ("the injured plaintiff willingly assumed the risks consistent with participating in the sport of golf"); *Thornberg v. Town of Islip,* 127 A.D.3d 1162, 1162 (2nd Dept. 2015) ("being struck in the head without warning by an errantly hit golf ball is a risk inherent in playing golf"); *Hornstein v. State,* 46 Misc.2d 486, 488 (Ct. Cl. 1965), ("it is a matter of *common knowledge* that on practically all golf courses … there are *parallel holes, played in opposite directions, where a sliced or hooked ball may and frequently does go into another fairway*. This is one of the incidents of all courses, with which golfers are generally familiar.") (emphasis added; quotation marks omitted).

B. The purpose of the assumption of risk doctrine – to facilitate participation in sports by protecting facilities like CGC from "prohibitive liability" – supports dismissal of this case.

As set forth in CGC's initial brief, the purpose of the assumption of risk doctrine – to protect the "enormous social value" of recreational sports from the "prohibitive liability" that would ensue without the doctrine – supports granting CGC summary judgment in this case. *Trupia v. Lake George Cent. School Dist.,* 14 N.Y.3d 392, 395 (2010). In its recent decision in *Grady,* 40 N.Y.3d 89, the Court of Appeals explained the reason for the continued viability of the assumption of risk doctrine in the era of comparative fault, notwithstanding that the doctrine tends to produce results similar to those that occurred under old fashioned contributory negligence, as follows:

> Our justification for retaining the doctrine in these circumstances is clear: because athletic and recreative activities possess *enormous social value,* even while they involve *significantly heightened risks*, we have employed the notion that these risks may be voluntarily assumed to preserve these beneficial pursuits as against the *prohibitive liability* to which they would otherwise give rise.

40 N.Y.3d at 94-95 (emphasis added; internal quotation marks omitted).

Katleski argues in his brief (at 38) that this is merely a "policy argument" that is "not controlling" in this appeal. This is incorrect, and it understates the importance of the policy underlying the assumption of risk doctrine. For one thing, as discussed in the amicus curiae brief submitted by the National Golf Course

Owners Association, the issues raised in this case impact not just CGC but also many other golf courses throughout the State and the nation.

For another thing, as the Court of Appeals explained in *Grady,* the policy underlying the assumption of risk doctrine shapes how courts apply it in practice. In particular, given the purpose of the doctrine to protect sporting venues notwithstanding the "significantly heightened risks" of the activities that they host (40 N.Y.3d at 94-95), the assumption of risk doctrine is *not* merely a means of measuring the culpability of the parties similar to the standards applied in a typical negligence or premises liability case.

Rather, the assumption of risk doctrine "is really a *principle of no duty,* or no negligence and so *denies the existence of any underlying cause of action*" where the plaintiff assumed the risk. *Grady,* 40 N.Y.3d at 95 (emphasis in original; quotation marks omitted). Katleski is thus wrong in arguing in his brief (at 36) that CGC should be judged based on the ordinary negligence standard "that businesses and landowner are required to exercise a duty of care to reasonably maintain their premises in a safe condition." To the contrary, because Katleski assumed the well known risk of being struck by an errant golf ball and CGC did not unreasonably enhance that risk, Katleski has no "underlying cause of action," and CGC has "no duty" to him under him under New York law. *Grady,* 40 N.Y.3d at 94-95.

POINT II

UNDER SETTLED NEW YORK LAW, CGC DID NOT UNREASONABLY ENHANCE THE RISK – BECAUSE IT DID NOT CREATE A UNIQUE AND DANGEROUS CONDITION THAT WAS NOT INHERENT IN THE SPORT OF GOLF.

A. CGC did not create a unique hazard that is not inherent in the sport of golf.

As discussed in CGC's initial brief, New York law is settled that, in an assumption of risk case, a defendant may be held liable for unreasonably enhancing a risk only if it creates a danger that is "unique" and not "inherent" in the sport. *See Morgan v. State,* 90 N.Y.2d 471, 485 (1997) ("in assessing whether a defendant has violated a duty of care within the genre of tort-sports activities … the applicable standard should include whether the conditions caused by the defendant's negligence are *unique* and created a dangerous condition over and *above the usual dangers that are inherent in the sport.*") (emphasis added; internal quotation marks omitted).

Katleski argues in his brief (at 24-25, 36) that this sports-specific standard does not apply, and that this case is instead governed by the general principle that "landowners are required to exercise a duty of care to reasonably maintain their premises in a safe condition." But the Court of Appeals recently confirmed that sports cases involving assumption of the risk are governed by the standard of whether the landowner created a dangerous condition that is "unique" and "over

and above the usual dangers that are inherent" in the sport. *Grady,* 40 N.Y.3d at 99 (quotation marks omitted). *See also Stanhope v. Burke,* 2023 N.Y. App. Div. Lexis 5402, *3 (3rd Dept. October 26, 2023) (same principle).

Here, Katleski was struck by an errant shot from an adjacent hole while searching for his ball, on a course he had played many times before, including earlier that very day. This is exactly the kind of danger that is normal and inherent in the game of golf, as a matter of settled New York law. *See Anand,* 15 N.Y.3d at 948 ("being hit without warning by a 'shanked' shot while one searches for one's own ball" is "a commonly appreciated risk of golf"); *Rinaldo v. McGovern,* 78 N.Y.2d 729, 733 (1991) ("the possibility that the [golf] ball will fly off in another direction is a risk inherent in the game").

B. This Court should not create a new requirement that golf course holes must be (1) separated by buffers, or (2) completely visible from other holes.

As discussed in CGC's initial brief, Katleski's basic argument, as set forth by his expert witness Stephen Eisenberg, is that CGC should have created impassable barriers between the holes, or (inconsistently) that CGC somehow should have provided for 100% visibility between the holes. R 2067-69; 2086-89; 2095-97. The amicus curiae brief of the New York Golf Course Owners Association confirms that such a rule would impose an extreme and impractical burden on golf courses.

In his brief (at 39), Katleski argues that the trial court's decision does not "affirmatively impose any safety requirements." Katleski contends that the trial court decision merely applies the principle that "where there are conflicting expert opinions … summary judgment is not appropriate."

This is a distinction without much difference. If any plaintiff injured by an errant golf shot from an adjacent hole can obtain a jury trial simply by submitting an expert affidavit arguing that the course could have been safer, then there is only one way a golf course can obtain summary judgment and avoid potential liability: by constructing impermeable barriers to absolutely prevent any chance of injury.

In fact, by denying CGC summary judgment, the trial court effectively imposed a new rule changing New York law – that a jury must decide the adequacy of a golf course's design and safety measures wherever there is an expert dispute, and that a golf course may not obtain summary judgment even where it has avoided creating a unique risk that is over and above the usual dangers inherent in the sport of golf. That is not the law.

As discussed above, the Court of Appeals has made perfectly clear that, in an assumption of risk case, a defendant can be held liable for unreasonably enhancing a risk only if the danger is "unique and created a dangerous condition over and above the usual dangers that are inherent" in the sport. *Grady,* 40 N.Y.3d

at 99 (quotation marks omitted). Plaintiff's expert does not and cannot show that CGC created any kind of "unique" risk here.

C. CGC need not prove the total absence of any "suboptimal conditions" on the golf course.

As set forth in CGC's initial brief, New York law is settled that, in an assumption of risk case, the operator of a sports facility will *not* be held liable merely for failing to remedy "suboptimal playing conditions." *See Bukowski,* 19 N.Y.3d 353, 357 (2012); *Secky,* 195 A.D.2d at 1348 (same principle). As this Court stated in the recent case of *McQuillan v. State of New York,* 218 A.D.3d 864 (3rd Dept. 2023):

> It is well settled that the doctrine of primary assumption of the risk may encompass risks engendered by *less than optimal conditions*, provided that those conditions are open and obvious and that the consequently arising risks are readily appreciable.

218 A.D.3d at 866-67 (emphasis added; quotation marks omitted) (dismissing claim where plaintiff struck foot on rock shelf in outdoor swimming hole).

In his brief (at 27-28), Katleski basically argues that cases involving alleged negligent design of a sporting venue form an exception to general principles of assumption of risk. This is incorrect. Indeed, the case on which Katleski principally relies in his brief (at 28), *Owen v. R.J.S. Safety Equipment*, 79 N.Y.2d 967 (1992), does not support his position. *Owen,* which involved alleged negligent design of a car racing facility, in fact ruled that a defendant can be liable only

where the design was not merely suboptimal but rather "was unique and created a dangerous condition over and above the usual dangers that are inherent in the sport." 79 N.Y.2d at 970.

Notably, several cases have applied the principles of assumption of risk to dismiss complaints specifically alleging negligent design of golf courses, despite disputes between the parties about whether the designs were optimal. *See Milligan v. Sharman,* 52 A.D.3d 1238, 1239 (dismissing claim that "layout" of adjacent holes was "unacceptably dangerous" because "injured plaintiff willingly assumed the risks consistent with participating in the sport of golf") (quotation marks omitted); *Lundin v. Town of Islip,* 207 A.D.2d 778, 778 (2nd Dept. 1994) (dismissing complaint alleging "negligence in the design and maintenance of the golf course" where plaintiff "was injured by a golf ball that had been played from another tee"); *Thornberg v. Town of Islip,* 127 A.D.3d 1162, 1163 (2nd Dept. 2015) (dismissing complaint alleging "that the golf course was negligently designed" based on assumption of risk); *Hornstein v. State,* 46 Misc.2d 486, 487-88 (Ct. Cl. 1965) (dismissing claim that "no barriers" separated adjacent holes, based on assumption of risk: "Mere proximity of parallel holes without the protection of barriers between them does not constitute negligence per se, and to impose liability on this record would make the defendant an insurer of the safety of its patrons.").

See also Morgan v. State, 90 N.Y.2d 471, 486 (applying assumption of risk and dismissing complaint alleging negligent design of bobsled facility).

D. The disagreement of the parties' experts does not warrant denying CGC summary judgment.

Katleski argues throughout his brief that the disagreement of the parties' experts requires denial of CGC's summary judgment motion. This is simply incorrect.

In *Secky,* this Court dismissed the complaint of a plaintiff who had been injured in a school basketball practice – although the plaintiff had submitted an expert affidavit criticizing the safety of the practice. *See Secky,* 195 A.D.3d at 1348 ("The opinion of plaintiff's expert that the drill could have been safer … was insufficient to raise an issue of fact given that the failure to do so did not unreasonably increase the inherent risks of the drill or playing basketball"). In *Grady,* the Court of Appeals affirmed this Court's decision in *Secky,* because the plaintiff's injury – like Katleski's here – "is one inherent in the sport … and so he assumed the risk of the injury he sustained." 40 N.Y.3d at 97.

Furthermore, courts have granted golf courses summary judgment based on assumption of risk in cases where, as in this case, plaintiffs have submitted expert testimony alleging defective design of the golf course. *See Milligan,* 52 A.D.3d at 1239 ("the affidavit of plaintiff's expert stating that the layout of the eighth green and the ninth tee was 'unacceptably dangerous' and that plaintiff was located

within an alleged 'area of conflict' is based on mere speculation"); *Thornberg,* 12 A.D.3d at 1163; *see also Hornstein,* 46 Misc.2d at 488 ("Plaintiff's own expert admitted … that he did not know of any golf course where at some place or other it would not be possible for someone to slice or hook his ball into another fairway.") (granting judgment to defendant after bench trial).

In addition, as discussed in CGC's initial brief, the speculative opinion of Katleski's expert is insufficient to create an issue of fact under New York law. Katleski relies chiefly on the opinion of his expert Stephen Eisenberg that CGC should have placed some sort of "impenetrable barriers" (R 2089) between the third and seventh holes. R 2088-89; 2095-97. Eisenberg, however, cites to absolutely no specific standard or authority requiring impenetrable buffers between adjacent golf holes. R 2086-89; 2095-97. Nor does Eisenberg cite any specific standard or authority requiring complete visibility between adjacent holes on a golf course. R 2086-89; 2095-97.

Furthermore, Eisenberg's opinion that Katleski was within the "zone of danger" when he was injured is wholly speculative. Eisenberg's diagram purporting to show the "zone of danger" does not even identify Katleski's position or the position of either hole on the course. R 2097. It purports to show a "zone of danger" extending behind the tee in question – as though to protect golfers from tee shots going backwards. R 2097. In the words of CGC's expert, the zone of

danger chart "fails to represent even the basic facts of Mr. Katleski's accident." R 2227.

Under established New York law, Eisenberg's unsupported and conclusory opinion should be rejected. The Fourth Department granted summary judgment to a golf course in a highly similar case, notwithstanding a dispute between the experts, where – much like in this case – "[t]he record does not establish precisely where plaintiff was located at the time of the accident, and thus the affidavit of plaintiffs' expert stating that the layout of the eighth green and the ninth tee was 'unacceptably dangerous' and that plaintiff was located within an alleged 'area of conflict' is based on mere speculation." *Milligan,* 52 A.D.3d at 1239. *See also Grandeau v. South Colonie Cent. School Dist.,* 63 A.D.3d 1484, 1486 (3rd Dept. 2009) (where expert opinions are "purely conclusory," they "have no probative force and are, therefore, insufficient to raise a question of fact.).

Finally, the only actual purported "industry standards" cited by Eisenberg are procedural rather than substantive; they merely state, in general terms, that golf course operators should consider safety issues and develop safety policies. R 2098-2103. But there is absolutely nothing in the record suggesting that, had CGC conducted a formal safety evaluation of the course, that could have prevented Katleski's accident. Quite the contrary.

Katleski argues in his brief (at 17) that the analysis performed by CGC's expert Barry Jordan "is one that should have been performed when the subject course was modified." But Katleski neglects to mention that Jordan stated in his affidavit "within a reasonable degree of professional certainty that had I been consulted" when a new tee box was added to hole three just 11 yards behind the existing tee box, "I would have approved the placement of tee box 'A,'" because it improved the overall safety of the course. R 2227-28. And any alleged failure on the part of CGC to develop safety policies does not establish that CGC created a "unique" risk that was not "inherent" in golf. *Morgan,* 90 N.Y.2d at 485. *See also Gavreau v. Course,* 1980 Ohio App. Lexis 11510, *4 (Ohio App. 1980) ("since one who plays golf assumes the risks of the game, whether or not [the course operator] had safety rules was not material"; granting summary judgment).

CONCLUSION

For these reasons and those set forth in our initial brief, CGC respectfully requests that this Court issue an order granting CGC summary judgment pursuant to CPLR 3212; dismissing Katleski's claims against CGC in their entirety with prejudice; and granting CGC such other relief as the Court deems proper.

Dated: November 22, 2023

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